(5)

No. 03-5554

DEC 15 2003

In The

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

SIXTH JUDICIAL DISTRICT COURT
OF NEVADA, HUMBOLDT COUNTY, et al.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the information society. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy.

SUMMARY OF ARGUMENT

Independent of and in addition to petitioner David Hiibel's claim that his conviction violates his Fourth Amendment rights against illegal searches and seizures, the Nevada statutory scheme categorically violates his Fifth Amendment privilege against self-incrimination by effectively giving law enforcement agents the power to require individuals to speak their names upon pain of criminal prosecution.

Only in the most limited instances can a government official compel a person to utter any factual assertion. A witness in a court or grand jury proceeding can be punished as a contemnor for refusing to speak or to answer questions, but only because in such contexts a judicial officer can ensure that the words demanded are not both testimonial and self-incriminating so as to implicate the Fifth Amendment. Outside of formal legal proceedings or special settings like vehicle stops, however, a government

[1] Letters of consent from both parties have been filed with the Clerk of Court. No counsel for either party has authored this brief, in whole or in part.

official cannot force an individual to utter testimonial words that pose any risk of self-incrimination.

Because uttering one's name to identify oneself is inherently testimonial, because such utterance risks self-incrimination without any judicial officer to determine otherwise, and because Nevada's questioning of Hiibel did not involve a vehicle stop or other special regulatory context, the statutory scheme under which Hiibel was convicted violates the Fifth Amendment.

ARGUMENT

The Fifth Amendment's guarantee that "[n]o person . . . shall be compelled in a criminal case to be a witness against himself" protects persons from being compelled to answer questions from government officials in all but a few specific and limited situations. In a court or grand jury proceeding, an individual is always offered judicial process to protect his Fifth Amendment rights. In an encounter with a government official outside formal legal process, the individual cannot be compelled by any threat of or actual legal sanction to utter testimonial, self-incriminating words.

The Nevada statutory scheme empowers police officers to determine when individuals must speak their identity.[2] When circumstances "reasonably indicate" that

[2] Nevada Revised Statute (NRS) 171.123 provides:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably

(Continued on following page)

an individual is engaged in criminal activity, police officers can force that individual to self-identify. Nevada's delegation of the power to compel speech conflicts with this Court's view of the Fifth Amendment, in which the power to compel speech has always been reserved to the judiciary. In forcing individuals to state their name upon pain of arrest or criminal prosecution, the Nevada statutory scheme impermissibly compels testimonial speech in a context where there is a substantial risk that it will be self-incriminating.

I. Hiibel's case falls outside the context of a formal legal proceeding where a judicial officer is available to protect an individual's Fifth Amendment rights.

One of the few instances in which an individual can be sanctioned for refusing to speak is in a formal proceeding

> indicate that the person has committed, is committing or is about to commit a crime.
>
> [. . .]
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

NRS 199.280 provides:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
>
> [. . .]
>
> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

such as a grand jury or court proceeding. Refusal to speak under these circumstances can lead to the punishment of contempt of court. *United States v. Wilson*, 421 U.S. 309, 317 n.9 (1975). As the Court held in *Chavez v. Martinez*, "[i]t is well established that the government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies." 123 S.Ct. 1994, 2001 (2003). But this sanction for refusing to speak is necessarily preceded by extensive legal process to ensure that the testimony being compelled does not require the individual to self-incriminate. Hiibel and others similarly situated have no such protection.

The Court has also held that "disclosure of private information may be compelled if immunity removes the risk of incrimination." *Fisher v. United States*, 425 U.S. 391, 400 (1976); *see also Ullmann v. United States*, 350 U.S. 422, 437 (1956). Testimony may also be compelled if the judge determines that even non-immunized testimony contains no risk of implicating the witness in any criminal activity.[3]

Moreover, even where a person enjoys access to judicial review before suffering any sanction for refusal to speak, courts are reluctant to impose criminal sanctions

[3] As Chief Justice Marshall wrote, "[w]hen a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be." *United States v. Burr*, 25 F.Cas. 38, 40 (C.C.D. Va. 1807) (No. 14,692e). *See also Mason v. United States*, 244 U.S. 362, 364-365 (1917).

unless absolutely necessary. In *Shillitani v. United States*, where a witness refused to answer questions even after he had been given immunity, the Court held that the judge must "first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." 384 U.S. 364, 372 n.9 (1964); *see also Young v. United States ex rel. Vuitton*, 481 U.S. 787, 801 (1987).

Under this Court's precedents, then, individuals are entitled to judicial determination of whether their speech would amount to testimonial self-incrimination before it can be compelled. The statutory scheme under which Hiibel was convicted is entirely unlike the witness testimony exception because it lacks the essential element that safeguards Fifth Amendment rights in that context: judicial review. The Nevada scheme allows police officers, not judges, to decide when speech may be compelled. NRS 171.123(1) empowers officers to detain individuals under "circumstances which reasonably indicate" that individual is engaged in criminal wrongdoing, while NRS 171.123(3) permits the officer to require the individual identify himself. The judiciary is completely bypassed.[4]

[4] Later formal legal process would not solve the Fifth Amendment problem here. If, in a criminal trial under NRS 171.123, the state tries to persuade the judge that the defendant's name would not have been incriminatory in the context of the street investigation and the crime being investigated, the defendant's refusal to answer at the time of the question would undeniably remain the basis for the arrest and prosecution.

II. Hiibel was criminally punished for refusing to utter inherently testimonial words that posed a serious risk of self-incrimination, under threat of a criminal sanction that prevents any finding that the utterance was voluntary.

That Hiibel was not participating in a formal proceeding at the time of his refusal to speak does not deprive him of Fifth Amendment protection.[5] Moreover, Hiibel's case lies outside any of the categories of questioning outside formal legal process where law enforcement agents can impose sanctions for refusal to comply with their demands to speak. One such category is speech that clearly is not testimonial. The second is where legal indicia of waiver ensure that the statement is voluntary and therefore not compelled. Because the Nevada statutory scheme compels speech by threat of criminal sanction and the speech that is compelled is testimonial, if falls into neither of these categories and therefore violates the Fifth Amendment.

A. Stating one's name is testimonial.

The Fifth Amendment's protections against compelled self-incrimination only apply to "testimonial" communications. *United States v. Hubbell*, 530 U.S. 27, 34 (2000). A testimonial communication is one that requires an individual to "relate a factual assertion." *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)).

[5] Just as *Miranda* extended the Fifth Amendment outside the courthouse, *Berkemer v. McCarty* made clear that the Amendment's protection extends to police stops based on less than probable cause. 468 U.S. 420, 439 (1984).

The Fifth Amendment is not implicated when a person is forced to utter words that have no testimonial value. *Schmerber v. California*, 384 U.S. 757, 761 (1966). Compulsion to produce "real or physical evidence" does not violate the Constitution. *Schmerber*, 384 U.S. at 764; *Holt v. United States*, 218 U.S. 245 (1910). As the Court explained in *Muniz*, requiring an individual to take a blood test raises no Fifth Amendment concerns because it does "not entail any testimonial act on the part of the suspect." 496 U.S. at 593. "In contrast, had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial." *Id.*[6]

The Nevada statutory scheme is unlike the forced utterance cases above because stating one's name is testimonial.[7] An individual's statement of identity is inherently testimonial because it requires him or her to "relate a factual assertion." *Muniz*, 496 U.S. at 589 (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)).

Further, in many circumstances, stating one's name will also be self-incriminating because one's name may

[6] Another way to comprehend the line between testimonial and non-testimonial evidence is to ask whether the individual could lie in response to the question posed. George Fisher, *Evidence* 800 (2002). To say one's name is to "relate a factual assertion" about which one could lie.

[7] *United States v. Wade*, 388 U.S. 218 (1967), does not support the proposition that stating one's name is not testimonial. When Wade was required to say words that had been uttered by the suspected robber, it was the sound of his voice, a physical characteristic, which was at issue. *Id.* at 222-223. Wade was "required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.*

provide a link to other facts about that individual that can be used to levy a higher penalty. After all, were it not for the capacity of identification requirements to link individuals to other acts, they would be of little interest to the police. Importantly, the statute only applies when it is substantially likely that stating one's name will be incriminating: when circumstances "reasonably indicate that the person has committed, is committing or is about to commit a crime." NRS 171.123(1).

Because the Nevada statutory scheme compels Hiibel to produce testimonial speech, it is not supported by cases excluding the mere production of non-testimonial, physical evidence from the protection of the Fifth Amendment.

B. Answering a police officer's questions in circumstances where refusal to answer constitutes grounds for arrest or prolonged detention is not voluntary.

Even outside formal legal process, a testimonial and self-incriminating answer to a law enforcement agent's question will not raise Fifth Amendment concerns if it is purely voluntary. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (voluntary response to non-custodial questioning; *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (voluntary response to custodial questioning where *Miranda* warnings properly received); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

This case does not involve any voluntary statement. A statute that criminalizes refusing to speak one's name

unquestionably compels speech. Thus, the Nevada statutory scheme bears no resemblance to circumstances under which the Court has in the past found speech voluntary.

As mentioned earlier, uttering of one's name is inherently testimonial and may be self-incriminating. In a street encounter, where no judicial official can determine whether the statement is incriminating, the presumption must be that it is.[8] Refusal to speak under these circumstances is like the "insolubly ambiguous" silence at issue in *Doyle v. Ohio*, which the Court held could not be used for impeachment purposes at trial. 426 U.S. 610, 617 (1976).[9] Even though Hiibel may not have been in custody, the presence of a public criminal law punishing the refusal to identify oneself is a species of legislative compulsion that surely requires proof of waiver.[10]

Nor is the Nevada statutory scheme analogous to the identification statute upheld in *California v. Byers*, 402 U.S. 424 (1971), which required those involved in traffic

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[8] The assumption that silence has Fifth Amendment value is especially valid given the widespread knowledge of the right to remain silent, which the Court recognized as pervasive in *Brogan v. United States*, 522 U.S. 398, 405 (1998).

[9] *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980), where the Court held that pre-arrest silence may be admitted to impeach a defendant's trial testimony, is distinguishable; the defendant did not face police questioning at the time of the silence, and his silence was not an element of any criminal offense.

[10] The state could hardly reply that defendants like Hiibel are unaware of the criminal punishment under the statute and therefore do not feel compelled, because then the state would essentially be admitting that the statute violates due process by not giving the public fair notice of the action criminalized. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

accidents to stop and identify themselves. *Id.* at 425. The plurality opinion held that the statute survived a Fifth Amendment challenge because it possessed two decisive characteristics: the statute was "neutral on [its] face and directed at the public at large," *id.* at 429 (quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965)) and it was "noncriminal and regulatory," *id.* (quoting *Albertson*, 382 U.S. at 70)). The Court took note that the statute "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising in automobile accidents." *Id.* at 430. These factors fatally undermined Byers's ability to demonstrate "substantial hazards of self-incrimination." *Id.* at 429 (quoting *United States v. Sullivan*, 274 U.S. 259 (1927)).[11]

In stark contrast, the Nevada statute *only applies* when a law enforcement agent "reasonably believes" that a person "has committed, is committing or is about to commit a crime." NRS 171.123(1). It thus lacks both of the critical characteristics of the statute in *Byers*. It is not "directed at the public at large" because it vests discretion in law enforcement agents to compel identification from a narrow subset of the population, those "reasonably believe[d]" to be involved in criminal activity. And it is obviously not "non-criminal." The Nevada statutory scheme more closely resembles that struck down in *Albertson v. Subversive Activities Control Board*, which required

[11] The Court has applied the regulatory purpose exception beyond the context of vehicle stops. *See Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 556 (1990) (rejecting Fifth Amendment challenge to juvenile court order requiring a mother to produce her child, on grounds that "production is required as part of a noncriminal regulatory regime.").

identifying information from those deemed criminally suspect. 382 U.S. at 79. ("Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry").

Only under the most limited circumstances may government officials compel individuals to speak. Individuals testifying in court or grand jury proceedings may be required to speak, but only after thorough judicial review to determine that their speech does not constitute testimonial self-incrimination. Out of court, individuals can be compelled to speak when their speech has no testimonial value. Because the Nevada statutory scheme compels testimonial self-incrimination by requiring individuals to choose between speaking their names or facing criminal sanctions, it is unconstitutional.[12]

[12] That is not to say that an individual cannot suffer negative consequences for refusing to speak. An individual's refusal to clear his name, for instance, may validly lead law enforcement officers to stop him for further investigation. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). This circumstance is, however, quite different from that in *Hiibel*, where the silence *itself* is criminalized.

CONCLUSION

Amicus submits that the Nevada statutory scheme violates the Fifth Amendment.

Respectfully submitted,

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[13] Amicus is grateful to Stanford Law Student Catherine Newby Crump for her invaluable contributions to this brief.